UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE PRINCERIDGE GROUP LLC,) Index No.: 11-CV-1460(AJN)

Plaintiff,

-against-

OPPIDAN, INC.,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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BACKGROUND AND INTRODUCTION

On or about April 19, 2010, Plaintiff drafted and provided to Oppidan a "Letter of Intent" (hereinafter the "Contract"), to provide Oppidan with financial advisory services regarding a portfolio consisting of sixteen (16) Oppidan owned properties. As defined by Plaintiff, "Advisory Services" were to include: (i) in cooperation with the Company, familiarize itself with the properties, business, operations, financial condition, management and prospects of the portfolio, (the "Assets") (ii) introduce the Company to potential buyers of the Assets; and (iii) provide such other advisory and investment banking services upon which the parties may mutually agree.

According to the Complaint and pursuant to the Contract, PrinceRidge agreed to search for and locate potential buyers of the Properties, and introduce them to Oppidan. According to the Complaint, Plaintiff alleges that, acting in conformance with the Contract, Plaintiff contacted and spoke with 84 entities seeking a potential buyer for the Properties. Also pursuant to the Complaint and referencing the Contract, at closing, PrinceRidge was entitled to a commission in an amount equal to 1.875% of the sales price. Instead of defining the compensation as a commission – even though it was directly tied to a percentage of the sale of real property, PrinceRidge defined the commission as the "success fee". Brokering a deal for the properties was central to and the primary purpose of the contract as highlighted that compensation was based upon an introduction and sale of property.

Plaintiff's central claim is that it "introduced" one such potential buyer to Oppidan – National Retail Properties ("NRP"). Despite the fact that Oppidan had previous and ongoing communications with NRP (the eventual buyer of the properties at issue), Plaintiff sought to recover a commission for the purported "introduction". Because PrinceRidge did not introduce Oppidan to the eventual purchaser, Oppidan declined to pay Plaintiff as Plaintiff did not earn any fee as set out by the terms of the Contract.[1] Plaintiff did not "introduce" NRP to Oppidan, and the record unequivocally establishes that Oppidan communicated with NRP – and a real estate broker employed by NRP – about buying properties as early as 2007, three years prior to Oppidan's contract with Plaintiff. Accordingly, Plaintiff did not earn its fee as Plaintiff did not perform in accordance with the terms of the Contract. Plaintiff should not receive a commission for "introducing" to Oppidan a company with whom Oppidan already had a long standing relationship.

The undisputed facts relevant to this case and wholly supporting dismissal are even more simple, and preclude Plaintiff from recovery for real estate brokerage services as PrinceRidge did not have the requisite license and is prohibited under New York Law from engaging in the brokerage of real property. Notwithstanding that PrinceRidge did not fulfill the terms of its engagement, PrinceRidge is not and was not a licensed real estate broker. Within the four corners of the applicable law as well as the precedent set forth by the Courts of New York and the Second Circuit, PrinceRidge cannot recover compensation for services rendered in the buying, selling, exchanging, leasing, renting, assisting or negotiating of real estate without alleging and proving that PrinceRidge was a duly licensed real estate broker or real estate salesman on the date when the alleged cause of action arose.

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[1] As stated above, Plaintiff would be compensated if they introduced Oppidan to potential buyers of the properties.

Accordingly, the cause of action for breach of contract fails. In addition, Plaintiff's alternative cause of action, for breach of the implied covenant of good faith and fair dealing is duplicative of the breach of contract cause of action and also must be dismissed. Moreover, the second cause of action cannot stand on its own as a prerequisite to such a cause of action is dependent upon the existence of an enforceable contract. There can be no breach of the duty of good faith and fair dealing when there is no valid and binding contract from which such a duty would arise.

Accordingly, even though Plaintiff seeks to recover a commission for introducing Oppidan to a former business contact, and that basis alone should dictate dismissal, it is black letter law that Plaintiff had no standing to bring this action. Despite significant discovery, Plaintiff was unable to, nor can Plaintiff even suggest, that it was licensed as a real estate broker. Accordingly, based purely upon the applicable law, summary judgment in favor of Defendants must be granted and the Complaint must be dismissed in its entirety.

STATEMENT OF FACTS

The Court is respectfully referred to the Defendant's attached Rule 56.1 Statement

ARGUMENT

THE EVIDENTIARY BURDEN FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment should be granted where, as here, "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." See Fed. R. Civ. P.

56(c). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 372, 381 (2007).

Summary judgment is proper when based on the full record, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Saleemi v. Pencom Systems, Inc., No. 00-7775, 2000 U.S. App. LEXIS 31760 at *1 (2nd Cir. Dec. 7, 2000); Graham v. Long Island R.R., 230 F.3d 34, 38 (2nd Cir. 2000); Browne v. CNN America, Inc., No. 99-9494, 2000 U.S. App. LEXIS 25480 (2nd Cir. Oct. 6, 2000) (citing, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)). In deciding the motion, the trial court must first resolve all ambiguities and draw all inferences in favor of the non-moving party, and then determine whether a rational jury could find for that party. Graham, 230 F.3d at 38. At the same time, the non-moving party must offer such proof as would allow a reasonable juror to return a verdict in his favor. Id. (citing, Anderson, 477 U.S. at 256). When that proof is slight, summary judgment is appropriate. Id. In this action, plaintiff is not even able to offer "slight" proof that would still result in dismissal. The evidentiary material before this Court provides just such a record. Accordingly, summary judgment is appropriate.

N.Y. Real Prop. Law § 442-d bars suits in federal courts as well as state courts. Am. Prop. Consultants, Ltd. v. Walden Lisle Assocs. Ltd. P'ship, 1997 U.S. Dist. LEXIS 9984, No. 95 Civ. 329 (KBW) (S.D.N.Y. July 14, 1997). As addressed below, plaintiff therefore does not have a claim for breach of contract. There is no question of fact that plaintiff acted within the purview of the New York Real Property Law and is barred from maintaining this lawsuit. Secondly, plaintiff's only other claim is duplicative of the breach of contract claim and, upon the law, must be dismissed. In addition, in order for a plaintiff to sustain a viable cause of action for breach of implied covenant of good faith and fair dealing, an enforceable contract must be established. Here, there is absolutely no question that the "contract" is unenforceable as a matter of law. Accordingly, as there is no question of fact, the complaint must be dismissed in its entirety with prejudice.

POINT I

NEW YORK LAW PRECLUDES PLAINTIFF FROM MAINTAINING A BREACH OF CONTRACT CAUSE OF ACTION FOR PLAINTIFF'S FAILURE TO ADHERE TO THE LICENSE REQUIREMENTS TO BROKER REAL PROPERTY

NY CLS Real P § 442-d (2012). Actions for commissions; license prerequisite

> No person, copartnership, limited liability company or corporation shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered, in any place in which this article is applicable, in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person was a duly licensed real estate broker or real estate salesman on the date when the alleged cause of action arose. NY CLS Real P § 442-d (2012).

NY CLS Real P § 440 (2012) defines a "real estate broker" as any person who, for another and for a fee, commission or other valuable consideration, lists for sale, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase or rental of an estate or interest in real estate, or negotiates or offers or attempts to negotiate, a loan secured or to be secured by a mortgage. N.Y. Real Prop. Law §§ 440(1). There is no question that (1) plaintiff acted within the scope of a real estate broker, and; (2) that plaintiff was not licensed to provide those services as required, and a prerequisite, to maintaining the claims alleged in the Complaint. (Defendant's Rule 56.1 Statement at ¶¶ 16, 28-30, 31, 41).

On or about April 19, 2010, Plaintiff provided a "Letter of Intent" drafted by Plaintiff and purporting to offer Advisory Services for the sale of various real property. (Defendant's Rule 56.1 Statement at ¶¶ 4, 5). According to the Complaint, Plaintiff alleges that acting in conformance with the Contract, Plaintiff contacted and spoke with 84 entities seeking a potential buyer for the Properties. (Defendant's Rule 56.1 Statement at ¶ 13). The Complaint goes on to allege that one such potential buyer that Plaintiff "introduced" to Oppidan was National Retail Properties ("NRP"). Despite the fact that Plaintiff describes the services as "advisory", it is clear both from the facts above as well as set forth in Plaintiff's own complaint, Plaintiff acted as a real estate broker. (Defendant's Rule 56.1 Statement at ¶ 14). Plaintiff's Complaint clarifies:

> To that end, on or about April 19, 2010, PrinceRidge and Oppidan entered into a Contract in New York **whereby PrinceRidge agreed to search for and locate potential buyers of the Properties, and introduce them to Oppidan**. (Defendant's Rule 56.1 Statement at ¶ 9) (emphasis added).

> **Compensation.** … At closing, [Oppidan] shall pay to PrinceRidge a fee in an amount equal to 1.875% of the sales price (the "success fee") in consideration for the Advisory Services provide by PrinceRidge. (Defendant's Rule 56.1 Statement at ¶¶ 9, 10).

Toward the end of April and beginning of May 2010, PrinceRidge met with Oppidan to discuss the process of finding buyers for the Oppidan properties. (Defendant's Rule 56.1 Statement at ¶ 22). PrinceRidge proposed to Oppidan PrinceRidge's process for indentifying potential buyers of the real estate, obtaining bids for the properties, and to address PrinceRidge's dealings in the commercial real estate market. (Defendant's Rule 56.1 Statement at ¶ 23). Tom Connors confirmed that PrinceRidge was to find potential buyers. (Defendant's Rule 56.1 Statement at ¶ 24).

As part of the overall strategy to sell the properties, PrinceRidge provided Oppidan with written materials addressing PrinceRidge's strategy toward selling the properties that contained facts regarding the properties that the potential purchasers PrinceRidge would seek out would want to know before a sale was consummated. (Defendant's Rule 56.1 Statement at ¶¶ 8, 17, 18). The marketing materials detailed each of the 16 properties and provided a "transaction overview" that detailed PrinceRidge would act exclusively to represent Oppidan in the sale of the 16 properties. (Defendant's Rule 56.1 Statement at ¶¶ 6, 15, 18, 19). PrinceRidge's marketing materials to Oppidan addressed each individual property, including the location of the property and various information relating to the value of the property in a potential sale. (Defendant's Rule 56.1 Statement at ¶ 21). PrinceRidge obtained the data, which included location, demographics and household income, so that potential buyers could use the information to determine a bid. (Defendant's Rule 56.1 Statement at ¶¶ 26, 40, 42). The information relating to the sale of the properties was created to send to potential purchasers of the real estate. (Defendant's Rule 56.1 Statement at ¶ 27).

The record leaves no doubt that PrinceRidge engaged in precisely those actions that bar recovery under New York law, from the Court of Appeals of New York through the appellate courts – that PrinceRidge was to indentify buyers that may be interested in buying the properties and ultimately, potential purchasers of the properties would submit bids for purchase directly to PrinceRidge. (Defendant's Rule 56.1 Statement at ¶¶ 20, 25). See, Feldbau v Klarnet, 109 Misc 2d 32, 439 NYS2d 596 (1981).

The Courts of this State do not exempt services like those provided by Plaintiff simply because the underlying agreement is not titled a "real estate contract"[2]. In an action to recover a "finder's fee" for real property, the Court of Appeals of New York dismissed the action as it was precluded by Real P Law § 442-d, since the statute broadly covers "compensation for services rendered," regardless whether the parties call the compensation finder's fees or commissions. (Defendant's Rule 56.1 Statement at ¶¶ 9, 10). See, Feldbau v Klarnet, *supra*, 109 Misc 2d 32, 439 NYS2d 596 (1981). In this case, the clear intent of the law cannot be circumvented through Plaintiff's substitution of "success fee" as the terms of its compensation. The fee is commission based, and a percentage of the "sales price" at "the closing" of real property, and falls squarely within the compensation precluded by rule and the courts. The law is clear that PR's attempt to recover "success fees" clearly falls within the Real Property Law and precludes recovery for Plaintiff's real estate brokerage services. The First Department has been just as clear

[2] The Contract/"Letter of Intent" was drafted by Plaintiff and does not contain any mutual drafting provision. Accordingly, any ambiguity in the drafting or potential reasons behind Plaintiff's failure to include "commission" as a defined term, cannot weigh against Defendant. "… fundamental principle of contract law that 'ambiguities in a contractual instrument will be resolved contra proferentem, against the party who prepared or presented it.'" Fredericks v. Chemipal, Ltd., 06 Civ. 966 (GEL), 2007 U.S. Dist. LEXIS 49185 *3 (S.D.N.Y. 2007), citing, 151 West Associates v. Printsiples Fabric Corp., 61 N.Y.2d 732, 734, 460 N.E.2d 1344, 472 N.Y.S.2d 909 (1984).

as the Court of Appeals – holding that a plaintiff is barred from recovery as "[t]he fact that plaintiff chose to **label** her activities in connection with such sale as 'consulting' is not determinative." Levinson v. Genessee Assocs., 172 A.D.2d 400; 568 N.Y.S.2d 780, 781 (1st Dept. 1991)(emphasis added). PrinceRidge "agreed to search for and locate potential buyers of the Properties, and introduce them to Oppidan…" and "at closing" receive a "success fee" in consideration of the sales price. Cmplt. 19. PrinceRidge's choice to **label** its activities as "advisory" or in terms of a "success fee" is not determinative as there is no question it acted within the label of the law, as a real estate broker. PrinceRidge defined the commission as the "Success Fee". (Defendant's Rule 56.1 Statement at ¶¶ 10). See, Feldbau v Klarnet, *supra*, 109 Misc 2d 32, 439 NYS2d 596 (1981)[finder's fees same as commission]; Levinson v. Genessee Assocs., 172 A.D.2d 400; 568 N.Y.S.2d 780, 781 (1st Dept. 1991)[consulting fee same as commission].

The Contract avoids any possible doubt that the dominant feature of the underlying engagement was the sale of the properties. To be clear, there is no suggestion that PrinceRidge was entitled to compensation of any kind unless the properties were sold. (Defendant's Rule 56.1 Statement at ¶¶ 9, 10, 11, 12). Compensation was based upon a commission, to be paid at closing, in an amount equal to 1.875% of the sales price. (Defendant's Rule 56.1 Statement at ¶ 9). Moreover, the Contract dictates that "PrinceRidge will appear on the closing statement and the Success Fee shall be disbursed from proceeds at the closing. The Success Fee shall be earned and paid **based on the sales price** of any assets sold within the portfolio." (Defendant's Rule 56.1 Statement at ¶ 11). As the Contract is for the sale of the properties as opposed to any other service, the Contract further provides that if one of the properties is sold in the future to a buyer introduced by PrinceRidge, that PrinceRidge would still be entitled to compensation for sale of the property. (Defendant's Rule 56.1 Statement at ¶ 12).

Here, there is no material question of fact that could establish anything other than the 16 properties were the dominant feature of the transaction at issue and that PrinceRidge was attempting to collect a fee for services facilitating the purchase and sale of the properties. The Contract even attaches a list of the properties that are to be sold by PrinceRidge. (Defendant's Rule 56.1 Statement at ¶ 7). Where a party cannot "demonstrate, that the underlying transaction was anything more than the purchase and sale of real property, or that the services rendered were for any purpose other than facilitating that purchase and sale" the claim must be dismissed pursuant to Real Property Law § 442-d" even where the collection of the fee was labeled a "finder's fee". Futersak v. Perl, 84 A.D.3d 1309, 1311, 923 N.Y.S.2d 728, 730, 2011 NY Slip Op 4629, *4-5 (2nd Dept. 2011) [Even though the parties referred to the compensation as a finder's fee, the underlying transaction was nothing more than the purchase and sale of real property and the services rendered were for facilitating that purchase and sale and the complaint was dismissed as the non-licensed broker was barred from recovery for breach of contract pursuant to Real Property Law § 442-d]. The Second Department had stressed this point earlier in holding that despite the existence of factors other than the real property, "since the dominant feature of the sale under review was its real estate, and since [the individual seeking compensation] was not a licensed real estate broker, he was not entitled to recover a fee for his services." Panarello v. Vinchiarello, 6 A.D.3d 515, 516-517, 775 N.Y.S.2d 360, 361-362 (2nd Dept. 2004) ["[T]he dominant feature of the transaction under review was not the sale of a Country Club business, but rather the transfer of valuable real estate." The real estate was the primary asset involved in this transaction.]

The services that plaintiff alleges it rendered in the case *sub judice* are akin to those addressed by the Southern District in American Property Consultants, Ltd. V. Walden Lisle Associates LP, 95 Civ. 329 (KMW), 1997 U.S. Dist. LEXIS 9984 (S.D.N.Y. 1997). A brief history of the facts of American Prop. is appropriate as specific similarities were presented. Plaintiff alleged that the defendants (or "Sellers") wanted to sell property, and that the Sellers wanted to retain plaintiff for what were essentially brokerage services. Plaintiff alleges that after receiving information about the property, plaintiff introduced the property to potential purchasers. Plaintiff alleges that thereafter a fee agreement was proposed with respect to the sale (the "Fee Agreement"). The Fee Agreement provided that Sellers would pay plaintiff a fee in the amount of 2.5% of the gross sale price and pay [a co-defendant] a fee of 1% of the gross sale price. Plaintiff alleged that it was entitled to payment of a fee equal to 2.5% of the gross sale price. The District Court disagreed and dismissed the breach of contract cause of action as "compliance with 442-d, which prohibits the unlicensed broker from collecting his commission, is mandatory." Id. at *30, citing, Meltzer v. Crescent Leaseholds, Ltd., 315 F. Supp. 142, 1970 U.S. Dist. LEXIS 11371 *24 (S.D.N.Y. 1970); see also, Strout Realty v. Phillipson, 49 Misc. 2d 435, 267 N.Y.S. 2d 752 (Sup. Ct. 1966).

The District Court held that:

> …introducing a potential buyer to a seller and assisting that buyer in consummating the sale, are those that have traditionally been defined as brokerage services and constitute the services of a "real estate broker" as defined by New York RPL § 440. NFS Servs., Inc. v. West 73rd St. Assoc., 102 A.D.2d 388, 477 N.Y.S.2d 135 (1st Dep't 1984) (procuring

> purchaser is within the scope of § 442-d), aff'd, 488 N.Y.S.2d 648 (1985). Therefore, under RPL § 442-d, plaintiff would be required to allege and prove that it was a duly licensed real estate broker or salesman at the time when the action arose or when it provided the services for which it seeks compensation. Bendell, 251 N.Y. at 308-09. Plaintiff has not alleged, nor can it allege, that it was licensed at the time the action arose, and is thus barred from bringing a suit for the payment of a commission. See, e.g., NFS Servs., [supra]."

American Prop. at 21-23.

Simply put, Defendants are entitled to summary judgment dismissing this action for brokerage commission asserted by a company [PrinceRidge] that was not licensed at the time of the activities that allegedly generated its right to commission, or when the transaction was consummated. Sharon Ava & Co. v Olympic Tower Assocs., 259 AD2d 315, 686 NYS2d 422 (1st Dept. 1999). "The IAS Court correctly determined that plaintiff was not licensed either at the time of the activities that purportedly generated the right to a commission or at the time the lease transaction was consummated and that plaintiff was, accordingly, barred, pursuant to Real Property Law § 442-d, from commencing the instant action to recover a commission for having brokered the lease transaction." Id. at 316.

The applicable law is straightforward and without any exceptions. For a plaintiff to sustain a cause of action for breach of an agreement to buy, sell, exchange, lease, rent, negotiate or assisting in consummating a sale of real property, that person must establish that he or she was a duly licensed real estate broker as defined by New York RPL § 440. Here, PrinceRidge listed the properties with various real estate media outlets to market the properties for sale. (Defendant's Rule 56.1 Statement at ¶ 32, 34, 35). The listings described PrincRidge as the (1) broker, (2) handling the sale, and; (3) marketing the properties for sale. (Defendant's Rule 56.1 Statement at ¶¶ 33, 34, 37). PrinceRidge's internal discussions also focused on how to best go about marketing the properties for sale and PrinceRidge confirmed its goal was to find a buyer for the properties and setting up a purchase of the properties. (Defendant's Rule 56.1 Statement at ¶¶ 36, 38, 39). As the Courts have determined that the actions provided by Oppidan have traditionally been defined as brokerage services and constitute the services of a "real estate broker", and Plaintiff has not alleged, nor can it allege, that it was licensed at the time the action arose, the breach of contract claim is barred and must be dismissed.

POINT II

PLAINTIFF'S CAUSE OF ACTION FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING MUST BE DISMISSED AS IT IS DUPLICATIVE AND AN ENFORCEABLE CONTRACT IS A MANDATORY PREREQUISITE TO SUSTAIN THE CAUSE OF ACTION

Plaintiff's second cause of action must be dismissed for two separate and independent reasons. First, New York law "does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled." Ely v. Perthuis, 12 Civ. 1078 (DAB), 2013 U.S. Dist. LEXIS 14952 (S.D.N.Y. 2013). Second, even if plaintiff only had only a cause of action under the implied covenant of good faith and fair dealing, plaintiff's claim fails as the underlying agreement is unenforceable, and therefore, there can be no breach of the implied covenant of good faith and fair dealing.

A. The Second Cause of Action is Duplicative and Must be Dismissed.

Plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing must be dismissed as this cause of action is duplicative. The covenant of good faith and fair dealing is implicit in all contracts, however, New York law "does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled." Ely v. Perthuis, supra ("Although Plaintiff argues the covenant claim is based on different facts than the contract claim, this Court disagrees. Both claims relate to the same events; therefore, the breach of covenant claim must be dismissed as duplicative."); Harris v. Provident Life & Accident Ins. Co., 310 F.3d 73, 81 (2nd Cir. 2002) (New York law does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled.).

Here, the Complaint alleges only two distinct causes of action, one sounding in breach of contract (Compl. ¶¶ 22-26) and one alleging breach of the implied covenant of good faith and fair dealing (Compl. ¶¶ 27-30). The Complaint, on its face, bases both alleged causes of action on the same set of facts. (Compl. ¶¶ 10-21). Accordingly, plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing is duplicative of the cause of action sounding in breach of contract and must, as a matter of law, be dismissed.

B. The Prerequisite of an Enforceable Underlying Agreement is Absent.

Even if plaintiff only had a cause of action under the implied covenant of good faith and fair dealing, plaintiff's claim fails as the agreement is unenforceable, and therefore there can be no breach of the implied covenant of good faith and fair dealing. Ely v. Perthuis, supra (Because Plaintiff's contract is unenforceable, her breach of covenant claim is barred.); Kargo, Inc. v. Pegaso PCS, S.A., 05 Civ. 10528 (CSH)(DFE), 2008 U.S. Dist. LEXIS 81888 (S.D.N.Y. 2008) (A claim for breach of the implied covenant of good faith and fair dealing is dependent upon the existence of an enforceable contract.); Stillman v. InService Am., Inc., 05 Civ. 6612 (WHP), 2008 U.S. Dist. LEXIS 40321, *6-7 (S.D.N.Y. 2008) (There can be no breach of the duty of good faith and fair dealing when there is no valid and binding contract from which such a duty would arise . . . because the alleged agreement is not enforceable, Plaintiff's good faith and fair dealing claim is also dismissed.).

As discussed above, the alleged agreement is not enforceable, therefore any claim sounding in breach of the implied covenant of good faith and fair dealing must, as a matter of law, be dismissed.

CONCLUSION

For the foregoing reasons, defendant respectfully requests that its Rule 56 motion be granted in its entirety and each of plaintiff's causes of action be dismissed; and that the Court grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
March 17, 2013

Respectfully submitted,

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